IN ERROR TO THE SUPERIOR COURT OF [redacted]
COUNTY, STATE OF GEORGIA.

BRIEF OF

John K. Cooper, Herman Brandt and Marion W. Harris

Counsel for Plaintiff in Error.

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IN THE SUPREME COURT OF THE UNITED STATES.

ISADORE MINDER,
Plaintiff in Error.

vs.

STATE OF GEORGIA,
Defendant in Error.

October Term, 1901, No. 417. In error to the Superior Court of Bibb County, State of Georgia.

BRIEF OF JOHN R. COOPER, HERMAN BRASCH AND MARION W. HARRIS, COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

In November 1900, Isadore Minder was convicted of murder in the Superior Court of Bibb County, and sentenced to death. After such conviction and sentence he made a motion for new trial in that Court as provided by the law of Georgia, which was refused, and his case was then taken by writ of error to the Supreme Court of Georgia, returnable with the March Term, 1901, and was assigned for a hearing in June, 1901. On the 18th day of July, 1901, the Supreme Court of Georgia affirmed the Superior Court of Bibb County, and the judgment of the Supreme Court of Georgia was made the judgment of Bibb Superior Court on the 5th day of August, 1901, at which time Judge William H. Felton sentenced Isadore Minder to hang on the 6th day of September, 1901. In the meantime the defendant Isadore Minder made application for a writ of error to the Supreme Court of the United States, and the writ was granted by Mr. Justice Edward D. White, on the 3d day of September, 1901. Notice being brought to the attention of the Governor of Georgia that a writ of error

had been granted to Isadore Minder by the Supreme Court of the United States, he suspended the sentence of death against Isadore Minder indefinitely.

BRIEF OF ARGUMENT.

The action of the Supreme Court of Georgia in affirming Bibb Superior Court in said case was contrary to the Constitution of the State of Georgia and the Constitution of the United States. Because by the decision of the Supreme Court of Georgia, refusing to reverse the judgment of the Superior Court of Bibb County, for the several reasons set out in Defendant's motion for new trial as it appears in the record, and particularly the ground of the motion for new trial relating to the motion for continuance on the ground of the absence of non-resident witnesses, and on the ground of the failure of the State of Georgia to afford by its laws a means and method of procuring depositions in behalf of the defendent, the defendant, Isadore Minder, as a citizen of the United States, was denied by the State of Georgia a fair, impartial and speedy trial of his case, as guaranteed him by the Constitution of the United States; was denied a right guaranteed him by the XIV. amendment of the United States Constitution to require the State of Georgia that it afford him some means or process to secure the testimony of said absent witnesses; that it denied to him as a citizen of the United States his right and privilege under the XIV. amendment to the United States Constitution to have said non-resident witnesses in Court during his trial, or else to have their depositions admitted in evidence in his favor upon his trial; and because it denied him his right to secure and introduce testimony upon his trial, where his life was involved; and was a denial to him, as a citizen of the United States, the equal protection of the laws with citizens of other States who are accorded such rights, viz., to introduce by depositions evidence of non-resident witnesses.

2. It was error for the trial judge to overrule the motion of the defendant, Isadore Minder to continue his case on the ground of the absence of non-resident witnesses. The judge should have granted the motion under the circumstances.

Counsel showed that these absent witnesses, would swear if they were present to the insanity of the accused, and so the Supreme Court of Georgia ought to have granted the defendant, a new trial.

65 Ga. 332.
100 Ga. 529.
30 Ga. 10.
101 Ga. 559.
Clark's Cr. Procedure 414.

3. The prisoner had a constitutional right to the compulsory process of the attendance of his witnesses. So if he is executed he will be deprived of his life without due process of law and without the equal protections of the law with citizens of other states of this union.

Section 1, Fourteenth Amendment of the Federal Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protections of the laws."

By this clause, the Fourteenth Amendment secured to every citizen of the United States the guaranty that his privileges and immunities as such citizen should not be abridged by any State; and it imposed, as a further specific restraint on State action, the time-honored provision of the Fifth Article of Amendment, that no man should be deprived of life, liberty, or property without due process of law, or what is its equivalent *lex terrae*, the law of the land, the famous provision contained in Magna Charta. But the framers went further, and adopted another clause, in language new to our constitutions: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws." This clause has been declared by the Supreme Court to be "a pledge of the protection of equal laws."

Article VI. of the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been commit-

ted, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him and have compulsory process for obtaining witnesses, in his favor; and to have the assistance of counsel for his defense.

Article I., Section 1, paragraph 3, of the Constitution of the State of Georgia:

"No person shall be deprived of life, liberty, or property, except by due process of law."

Article I., Section 1, paragraph 5, of the Constitution of the State of Georgia:

"Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel, shall be furnished, on demand, with a copy of the accusation; and a list of the witnesses on whose testimony the charge against him is founded; shall have compulsory process to obtain the testimony of his own witnesses; shall be confronted with the witnesses testifying against him, and shall have a public and speedy trial by an impartial jury."

Fourteenth Amendment of the Constitution of the United States by Guthrie, page 27: "It is the shield which the arm of our blessed government holds at all times over every one, man, woman, and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No State—such is the sovereign command of the whole people of the United States—no State shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no State, even with due process of law, shall deny to any person within its jurisdiction the equal protection of the laws."

Judge Story said in his great work on the Constitution: "What is to become of constitutions of government if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions, to suit the temporary passion and interest of the day? Let us never forget that our constitutions of government are solemn instruments, addressed to the common sense of the people, and designed to fix and perpetuate their rights and their liberties.

They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambitions of political leaders. They are to speak in the same voice now and forever. They are no man's interpretations. They are ordained by the people, and can be changed only by the sovereign command of the people."

Fourteenth Amendment of the Constitution of the United States, by Guthrie, page 114. "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

4. No State in this Union shall deprive a citizen of his life, liberty or property without due process of law, nor deny to any citizen the equal protection of the laws. Due process of law is process of law according to the law of the land.

181 United States vs. Barber Asphalt Paving Co. 330, 331, 334, 335.

182 U. S., Simon vs. Craft, 427.

118 U. S., Yickwo vs. Hopkins, 369, 374.

96 U. S., Davidson vs. New Orleans, 102.

165 U. S., Meyer vs. Louisiana, 578.

Cooly on Constitution limitations, 351.

181 U. S., Mallet vs. N. C. 599.

5. There is no law on the statute books of Georgia by which depositions can be taken from non-resident witnesses in capital cases. This is a defect in the criminal laws of Georgia. Georgia is far behind New York, Tennessee, Texas and other States of this Union in that respect.

6. It is within the power of each State of this Union to try and punish her own citizens according to her laws as long as the authority does not infringe upon the limited power of the Constitution of the United States.

114 U. S., *ex parte* Reggel, page 642.

7. A person accused of crime has a right to process to compel the attendance of witnesses in his behalf.

8 West. Rep. 575.

91 Mo. 228.

8. The contitutional guaranty that persons accused of crime shall have compulsory processs for obtaining witnesses

in their favor includes, as an essential to the enjoymont of the right, reasonable time for making such process effectual, and a statute whose effect is to bring the defendant to trial before he has had a proper opportunity to obtain his witnesses is unconstitutional and void.

Graham vs. State, 50 Ark. 161.
Berkly vs. State, 10 West. Rep. 67.

9. Prior to the adoption of the fourteenth amendment to the United States Constitution, the first ten amendments to that Constitution were mere limitations upon federal power, but since the adoption of the fourteenth amendment, all the privileges and immunities laid down in this amendment have fallen under the protection of the general government by virtue of the fourteenth amendment; under the sixth amendment to the United States Constitution it is provided that the accused "shall have compulsory process for obtaining witnesses in his favor;" this right has now been enlarged and extended by the fourteenth amendment beyond the mere guaranty of it to a person charged with crime in the United States Courts, and has become under that amendment a guaranteed right to every citizen of every State, charged with crime in the State Courts.

This question was raised in the case of Spies against Illinois, 123 U. S. Rep. pages 131, 151, 152, 123, 166, 180, 181, where Spies claimed that the fourteenth amendment protected him from an unlawful search and seizure of his papers and from the use of such papers as evidence on a trial in the State Court.

See also full discussion of this question in Landon's Constitutional History, pages 102, 294, 295, 296.

10. The record in this case does not show that Minder was present in Court when the sentence of death was passed upon him, nor does it show that he was asked by the Court if he had any reason to urge against the imposition by the Court of the sentence of death; this is a failure of due process of law as guaranteed by the fourteenth amendment and the judgment against the prisoner is fatally defective for the reason

and if he should be hung under it, he would be deprived of his life in violation of the fourteenth amendment to the Constitution of the United States.

Ball vs. United States, 140 U. S., p. 119, 129, 130.
Schwab vs. Berggren 143 U. S., p. 442, 448.
9 Vol. Am. Cr. Rep, French vs. State 348.
3 Vol. Am. Cr. Rep. 304.
87 Ga. 584,
67 Ga. 653.
55 Ga. 521.
53 Ga. 138.
12 Ga. 25.
2 Vol. 37 S. E. Rep. 966.
60 Ga. 431.
Clark's Criminal Procedure 423.

This is a case that ought to be reversed by this high tribunal on its merits, because the Supreme Court of Georgia said in their opinion that they would have been better satisfied in affirming the Court below if the jury had seen fit to recommend the prisoner to life imprisonment, but said they had no power to reverse the case. The following is part of the opinion of the Supreme Court of Georgia:

"The deceased was an Irishman; the accused was a Jew, and undoubtedly a man weak both in mind and body, but not to such extent to be irresponsible. The deceased seems to have been thoroughly imbued with an antipathy to Jews in general, and to the accused in particular, and never lost an opportunity to insult by language, and place upon the accused indignities which were hard to bear. The evidence authorized an inference that, on account of the overbearing conduct of deceased towards the accused at different times, the accused was in mortal dread of him, and his mere presence would sometimes throw the accused into a highly excited and nervous condition. At different places at which the accused lived the deceased had lived, and his conduct toward the accused had been that which was calculated to insult and degrade. He was goaded in a manner that was pitiable, and in a fit of desperation he took the life of his persecutor. Under the law he was guilty of murder. The jury were authorized to

so find; the trial judge has approved this finding, and we have no authority to interfere. We would, however, have been better satisfied, in affirming the judgment of the Court in refusing to grant a new trial, had the jury seen fit, in the exercise of the authority which the law vests in them, to commute the penalty to life imprisonment. That, however, is a matter which is, under the law, left to the jury, and neither the trial judge nor this Court has a right to change the punishment which the law prescribes. If a mistake has been made, and this is one of those cases where the penalty should be imprisonment instead of death, the accused is without a remedy, so far as the judicial department of the government is concerned and must make his appeal to the executive."

113 Ga., Minter vs. State, 772.

11. Mr. Justice Brown said in the case of Downes vs. Bidwell, 182 United States, Rep. page 282.

"We suggest without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishment; and to such other immunities as are indispensible to a free government.

12. The proposition in brief is this: By Article V. of the Amendments, the United States Government may not deprive a citizen of life, liberty or property, without due process of law. By Article XIV. of the Amendments, this salutary provision is given a further extension. The States may not deprive a citizen of the United States of life, liberty or property, without due process of law. What is due process of law? Article VI., which immediately follows Article V., and which must be construed in *pari meteria* with it in order to deter-

mine what is due process of law in criminal cases, the subject to which it relates, stipulates expressly that the prisoner shall, among other rights, have compulsory process to obtain the attendances of his witnesses. This is a national definition of what constitutes due process of law. It is a conclusive definition. It can be denied to no person under the ægis of the Constitution, and the defect in the case against the prisoner of which he has the right to complain is that neither the Government of the United States nor the government of the State have given him the compulsory power to obtain the attendance of witnesses who live beyond the boundary lines of Georgia or have their testimony by depositions. This power might well have been granted by the State to the extent that the process could be issued and served so far as the State officials could serve it, it could be made effective by the Congress under the authority granted by Article IV. of the original Constitution, which provides, that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof. It cannot well be doubted that this is Constitutional authority to Congress to authorize the subpoena of the State court to run and be effective in any other State just as it is authority to Congress to authorize the record of a judicial proceeding in one State to be made evidence in another State and since Congress and the States have not co-operated to give the person accused of a capital crime this power of obtaining the presence of witnesses beyond the boundaries of the State, such persons when put on trial and convicted are deprived of due process of law in the meaning of the Constitution.

Respectfully Submitted
John R. Cooper
Marion Harris
Counsel for Plaintiffs in Error

UNITED STATES OF AMERICA.

To the Honorable Supreme Court of the United States:

At the November Term, 1900, of the Superior Court of Bibb County, Georgia, I. Minder was tried for the offense of murder, and was convicted therefor and sentenced to death. A motion for new trial was made upon the ground, amongst others, that the Court erred in refusing to continue the case on account of the absence of some material witnesses residing in the State of Alabama—it being shown to the Court that the witnesses had been subpœnaed and refused to attend court upon the advice of their counsel in Alabama that there was no law requiring them to leave their State to attend as witnesses a court of another State. The Court refused to continue the case, as it had no authority to send for such witnesses or compel their attendance. It was then claimed that the failure of the law of Georgia to provide a method for compelling the attendance of witnesses from beyond the jurisdiction of the State, or for obtaining the depositions of such witnesses and allowing them to be introduced in evidence in behalf of a person charged with crime amounted to a denial to such person of equal protection of the laws, and that a conviction under such circumstances would be depriving him of his life without due process of law, in violation of the 14th amendment of the Constitution of the United States. This

Due and legal service of the above and foregoing motion to advance the case of I. Minder against the State of Georgia, pending in the Supreme Court of the United States, is hereby acknowledged and copy of same and all further service of notice relative thereto waived, and consent is hereby given for said motion to be presented at any time Counsel for Defendant in Error may see proper.

This the 4th day of November, 1901.

JOHN RANDOLPH COOPER,
HERMAN BROSCH, and
M. W. HARRIS,
Counsel for Plaintiff in Error.